

respondent from providing future treatment until claimant undergoes a medical evaluation at respondent's request.

Claimant contends the ALJ correctly awarded unauthorized medical for claimant's 2015 examination with Dr. Prostic, held she overcame the presumption she no longer required future medical treatment, and concluded her right to future medical should remain open. According to claimant, she is not obligated to attend medical examinations when she is not currently requesting treatment, and that there is no evidence she refused to attend any medical evaluations. Claimant maintains any failure to appear for medical examinations has no relevance in determining whether the termination of future medical benefits is appropriate under K.S.A. 44-510k(a)(3). Finally, claimant claims K.S.A. 44-510h and K.S.A. 44-510k are unconstitutional. Claimant urges the Board to reverse the ALJ's decision and unconditionally deny respondent's request to terminate medical benefits and award unauthorized medical.

Respondent contends claimant neither pursued nor received authorized medical treatment for more than two years following the settlement of her claim and, therefore, claimant's right to future medical treatment should be permanently foreclosed. Respondent asserts claimant deliberately refused to undergo medical evaluations and that the ALJ erred in considering Dr. Prostic's 2015 report and 2016 testimony because they were obtained in violation of the ALJ's October 23, 2012, order appointing Dr. Prostic a neutral physician. Respondent insists Dr. Prostic's opinions do not overcome the presumption claimant no longer requires medical treatment. Respondent emphasizes claimant did not testify she needed medical treatment, and argues the ALJ exceeded his authority by extending the two-year time period provided for in K.S.A. 44-501k(a)(1). Respondent requests the Board affirm the Award.

The issues are:

1. Does the ALJ's Post Award Medical Award exceed his authority?
2. Should Dr. Prostic's 2015 report and 2016 testimony be excluded from consideration because they were obtained in violation of the ALJ's October 23, 2012, order appointing Dr. Prostic a neutral physician?
3. Did claimant overcome, with competent medical evidence, the presumption she no longer requires medical treatment?
4. Is claimant entitled to the payment of unauthorized medical compensation for Dr. Prostic's 2015 examination?
5. Does the Board have jurisdiction to rule on the constitutionality of K.S.A. 44-510h and 44-510k?

FINDINGS OF FACT

Claimant injured her back on February 23, 2012. At a prehearing settlement conference on October 24, 2012, the ALJ appointed Edward J. Prostic, M.D., a neutral physician to provide his opinion regarding claimant's functional impairment. That order states in relevant part:

Claimant's counsel shall make the appointment [with Dr. Prostic] at the physician's earliest convenience. Claimant's counsel shall prepare on non-letterhead stationery a letter of confirmation of the appointment made and an itemization of the relevant medical records to be reviewed by the physician. The letter shall be sent to the physician after it is signed by both claimant's counsel and respondent's counsel, thereby indicating the parties' agreement to the contents of the letter and the records to be reviewed. Counsel shall not further contact the physician without court approval except to respond to the physician's request for additional information. Any additional information or further tests or referrals for the examination must be by agreement of the parties or by approval of the court.¹

Dr. Prostic examined claimant on November 26, 2012. In his report, the doctor diagnosed a back injury with right S1 radiculopathy, and rated claimant's permanent impairment at 10 percent to the body as a whole. The report also indicated:

If symptoms worsen, epidural steroid injections should be offered. If symptoms are intractable, CT myelography will be necessary to guide surgery.²

On February 15, 2013, claimant settled her claim for a lump sum payment based on a 10 percent permanent functional impairment of the whole body. The settlement was on a "running award" basis, with future medical treatment and review and modification left open on proper application.

On May 7, 2015, claimant filed a post award application requesting medical treatment for her low back. On May 8, 2015, Dr. Prostic again examined claimant at the unilateral request of claimant's counsel. The examination was for the purpose of obtaining the doctor's opinion regarding claimant's need for medical treatment. The examination was not scheduled to obtain an impairment rating, nor was the exam scheduled in response to a request by Dr. Prostic for additional information.

On May 12, 2015, respondent filed an application for post award medical requesting, pursuant to K.S.A. 44-510k(a)(3), the termination of claimant's right to future treatment. Respondent alleged claimant had not received authorized medical care within two years

¹ ALJ Order (Oct. 24, 2012) at 1.

² Prostic Depo. Ex. 2 at 2.

following her settlement. On May 15, 2015, claimant filed an application for preliminary hearing, requesting payment of unauthorized medical for Dr. Prostic's May 8, 2015, examination.

On May 20, 2015, respondent's attorney notified claimant's counsel of an evaluation by Dr. David Ebelke scheduled on Monday, June 8, 2015. Claimant did not attend that exam. On June 10, 2015, respondent filed a motion requesting the cancellation of any preliminary hearing until claimant was examined by Dr. Ebelke. Respondent also requested claimant's application for post award medical treatment be denied because of her failure to attend the appointment. According to respondent, claimant also failed to attend an examination, also with Dr. Ebelke, scheduled for June 15, 2015.

Claimant's applications for post award medical and preliminary hearing were scheduled on July 1 and July 8, 2015, but were canceled by claimant's counsel. Those matters were not rescheduled.

On October 12, 2015, respondent provided claimant with five dates in November 2015³ when she could schedule an examination with Dr. Ebelke. Claimant apparently made no effort to schedule an examination on any of the dates.

Respondent's application for post award medical was heard on December 23, 2015. No testimony was presented.

On January 28, 2016, respondent filed a motion to exclude the report of Dr. Prostic's May 8, 2015, examination. In support of the motion, respondent alleged claimant's counsel contacted Dr. Prostic and arranged for the doctor's 2015 examination, without court approval or the parties' agreement, thereby violating the "no contact" provisions of the ALJ's order appointing the doctor as a neutral physician. The parties provided the ALJ with written arguments and, on February 3, 2016, the ALJ ruled on the motion, finding that, although claimant's counsel violated the October 24, 2012, order by contacting Dr. Prostic seeking his opinion about additional medical treatment, evidence from the doctor regarding his 2015 examination would be considered on the post award medical issues. The February 3, 2016 order explains the ALJ's rationale:

Claimant's counsel did violate the October 24, 2012 order. The question is whether a sanction is appropriate, and such question is purely up to the court's discretion.

The court considered several factors.

1. Violations of "no further contact" language in orders for independent medical examinations undermines the independent nature of the medical examiner. A sanction would discourage violations.

³ The examination dates were on November 3, 9, 10, 16 and 17, 2015.

2. Claimant's counsel contacted Dr. Prostic on a completely different subject (additional medical treatment) than was involved in the independent medical examination (functional impairment).
3. Dr. Prostic's independent medical examiner status is irrelevant to the post award medical issue. K.S.A. 44-510k(a)(3) says there is a presumption no further medical care is needed if the claimant has not received medical treatment within two years of an award, and that the presumption may be overcome by competent medical evidence. The subsection does not require a weighing of medical evidence such that one physician's opinion may be more persuasive than another. The subsection only requires the presence of competent medical evidence. The respondent would not be prejudiced by the evidence coming from an independent medical examiner.

Weighing the above factors, the court will not impose a sanction in this instance. The court will allow evidence from Dr. Prostic on the post award medical issue.

Claimant's counsel is admonished not to contact court ordered independent medical examiners in violation of the order.

No party requested Board review of the February 3, 2016 order and the Post Award Medical Award did not revisit the issue of the admissibility of Dr. Prostic's 2015 report and 2016 testimony.

Dr. Prostic was deposed on February 15, 2016. Respondent objected to the doctor's testimony and report based on the opinion of the Court of Appeals in *Base*.⁴ In support of that objection, respondent argued Dr. Prostic was designated as a neutral physician and the ALJ ordered counsel not to contact the doctor without court approval or the agreement of the parties.

In response to an e-mail sent by the ALJ, claimant's counsel stated, on March 29, 2016: "Claimant can stipulate that she was unable to appear at the two scheduled exams in June, 2015 because she was at home caring for her ill father," and "Claimant can further stipulate that she was unable to accept any additional Dr. Ebelke examination dates offered by respondent."

Dr. Prostic testified his May 8, 2015, evaluation revealed claimant did not report any new accidents or injuries. In addition to taking a history, Dr. Prostic took x-rays of claimant's lumbar spine and conducted a physical examination. Dr. Prostic reviewed

⁴ *Base v. Raytheon Aircraft Company*, 50 Kan. App. 2d 508, 329 P.3d 540 (2014).

reports of Dr. Eden Wheeler dated September 25, 2012, and of Dr. Daniel Zimmerman dated September 20, 2012.⁵

Dr. Prostic testified he found claimant continued to have evidence of right S1 radiculopathy, with more calf atrophy than on his previous examination. Dr. Prostic opined claimant needed additional medical care, consisting of injections into her trochanteric bursae, exercises, medicines, and if those did not provide relief of radicular symptoms, claimant should receive epidural steroid injections. The doctor testified he recommended a combination of prescription and over-the-counter medications.

Dr. Prostic opined the medical treatment he recommended was the result of claimant's February 2012 work-related injury. Dr. Prostic testified his charge for the May 8, 2015, evaluation was \$401 and was not used for his previous impairment rating.

On April 5, 2016, the ALJ entered an order on respondent's application for post award medical, finding the presumption that no further medical care is needed was overcome by competent medical evidence, however, the ALJ imposed the following conditions on claimant's right to future medical:

1. Within 90 days claimant must schedule and attend an examination by a physician authorized by respondent or claimant's future medical benefits will terminate.
2. If claimant declines treatment recommended by the physician, her future medical benefits will terminate and respondent will pay \$401 for unauthorized medical services of Dr. Prostic.
3. If claimant consents to treatment, her right to future medical treatment will terminate when she is released from treatment and respondent will pay \$401 for unauthorized medical services of Dr. Prostic.
4. If claimant schedules an examination with respondent's authorized physician but fails to attend, claimant's future medical benefits will terminate and any charges for failure to show will be deducted from claimant's \$401 unauthorized medical expense.

Claimant timely applied for Board review.

⁵ These reports were made a part of the record at the settlement hearing. Dr. Wheeler's report was also offered into evidence without objection at Dr. Prostic's deposition. (Prostic depo. at 11).

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-510k(a) provides:

(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

(3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

K.S.A. 2011 Supp. 44-515(a) provides in pertinent part:

After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon request of the employer, but the employee shall not be required to submit to an examination oftener than twice in any one month, unless required to do so in accordance with such orders as may be

made by the director. All benefits shall be suspended to an employee who refuses to submit to such examination or examinations until such time as the employee complies with the employer's request. The suspension of benefits shall occur even if the employer is under preliminary order to provide such benefits.

K.S.A. 44-518 provides:

If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

K.S.A. 2011 Supp. 44-523(a) provides:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties a reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

The Board finds as follows:

1. The ALJ's Post Award Medical Award is vacated and the claim is remanded to the ALJ with directions to provide respondent a reasonable opportunity to be heard and present evidence before ruling on respondent's application for post award medical. The only matter before the ALJ at the December 23, 2015, hearing was respondent's application requesting termination of claimant's right to future treatment. Claimant filed applications for preliminary hearing and post award medical, and those applications were scheduled for hearing, but were thereafter canceled by claimant.

There is no dispute claimant did not receive any authorized treatment during the two-year period following the 2013 settlement and that, therefore, the presumption arose that claimant did not require further medical treatment. The burden of proof then shifted to claimant to overcome that presumption with competent medical evidence. Claimant sought to overcome the presumption by having claimant examined by Dr. Prostic, who recommended additional treatment. Claimant apparently had no difficulty attending the examination arranged by her counsel.

Respondent sought to have claimant undergo a medical evaluation, which respondent had a right to do, pursuant to K.S.A. 44-515(a). Claimant had an obligation to attend medical evaluations arranged by respondent, subject to the limitations set forth in that statute. Claimant did not attend two medical examinations in June 2015, and also failed to arrange appointments with Dr. Ebelke on the five dates provided by respondent. As noted by the ALJ, claimant was evidently caring for her ailing father, at least she was in June 2015. Such an extraordinary circumstance might justify claimant's failure to attend the June 2015 appointments, but the record offers no such circumstances in November 2015.

Claimant's failure to attend appointments with Dr. Ebelke had the effect of depriving respondent of a reasonable opportunity to be heard and present evidence, a right afforded to all parties under the Act. Although the evidence currently in the record shows claimant's right to future medical should remain open, thus overcoming the presumption claimant no longer requires treatment, respondent must be given the opportunity to have claimant examined and present medical evidence. Moreover, the Board finds future medical should not be tied to what Dr. Ebelke (or any physician respondent chooses to examine claimant) may conclude and whether claimant submits to any treatment the doctor may recommend. The ALJ's Post Award Medical Award must be vacated, and the claim remanded.

On remand, the ALJ shall afford respondent the opportunity to have claimant examined by a physician of its choosing, and the parties shall be provided with the opportunity to take such doctor's deposition. Claimant shall attend the examination. The evidence currently in the record shows future medical should remain open.

2. The issue raised by respondent that the ALJ erred in considering Dr. Prostic's 2015 report and 2016 testimony is not properly before the Board and will not be addressed. This issue was not decided by the ALJ in the Post Award Medical Award. Instead, respondent raised the issue by motion, and the ALJ decided that issue in his February 3, 2016, order. No Board review of that order was requested, and the Post Award Medical Award does not again address the issue. Under K.S.A. 2011 Supp. 44-551(i)(1), the Board may exercise jurisdiction only upon written request within 10 days.

3. Pursuant to K.S.A. 44-515, all workers compensation benefits to claimant, including future medical treatment, shall be suspended until such time she satisfies her obligation to attend a medical examination scheduled by respondent. Such suspension shall continue until such time as claimant complies with respondent's request and cooperates with the physician's evaluation.

4. Claimant contends she is entitled to \$401 in unauthorized medical for Dr. Prostic's 2015 examination. However, the only issue before the ALJ was whether claimant's right to future medical treatment should be terminated, and that is the only issue now before the Board. Claimant raised the unauthorized medical treatment issue, by

application for preliminary hearing, but that application was not heard by the ALJ and is not properly before the Board.

5. The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional.⁶ The Board will not rule on claimant's constitutionality issues.

CONCLUSIONS

1. The Post Award Medical Award is vacated, and the claim is remanded with the directions detailed in this Order.

2. The issue of the admissibility of Dr. Prostic's testimony and 2015 report is not properly before the Board and will not be addressed.

3. Pursuant to K.S.A. 44-515, all workers compensation benefits to claimant, including future medical treatment, shall be suspended until such time as she satisfies her obligation to attend a medical examination scheduled by respondent and cooperates with the physician's evaluation.

4. The issue of claimant's entitlement to unauthorized medical is not properly before the Board and will not be addressed.

5. The Board has no authority to decide the constitutional issues raised by claimant, and those issues will therefore not be addressed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

DECISION

WHEREFORE, the Board finds the Post Award Medical Award of Administrative Law Kenneth J. Hursh dated April 5, 2016, is vacated and remanded to the ALJ with directions consistent with this Order.

⁶ See *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2014 WL 5798476 (Kan. WCAB Oct. 27, 2014); *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *Pinegar v. Jack Cooper Transport*, No.1,059,928, 2014 WL 1758036 (Kan. WCAB Apr. 9, 2014).

⁷ K.S.A. 2010 Supp. 44-555c(j).

IT IS SO ORDERED.

Dated this _____ day of June, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

e: Zachary A. Kolich, Attorney for Claimant
zak@wallaceandkolich.com
cpb@wallaceandkolich.com

Matthew J. Stretz, Attorney for Respondent and its Insurance Carrier
kvanwijk@sqlawkc.com
mstretz@sqlawkc.com

Honorable Kenneth J. Hursh, Administrative Law Judge